

DOCKET NUMBER 125

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U.S. BANKRUPTCY CT.
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9 UNITED STATES BANKRUPTCY COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11 SAN DIEGO DIVISION

12 In Re:

13 FRANCIS J. LOPEZ,
14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

15 **OPPOSITION OF ALLEGED DEBTOR**
16 **TO MOTION FOR TERMINATING**
17 **SANCTIONS; DECLARATION OF**
18 **FRANCIS J. LOPEZ IN SUPPORT**
19 **THEREOF**

20 Date: January 28, 2007
21 Time: 10:30 a.m.
22 Ctrm: 4

23 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY
24 JUDGE, TO MOVANT PETITIONING CREDITOR ALAN STANLY:

25 The Declaration of Francis Lopez attached hereto is in response to the Motion for
26 Terminating Sanctions filed by Mr. Keehn. The Motion is based on the failure of Mr.
27 Lopez to pay sanctions to Mr. Keehn in the amount of \$8,130.50.

28 This is a case about an alleged Debtor who owns a home with his wife in Florida
and virtually nothing else. The Petitioning Creditor has acknowledged that. The Alleged

1 Debtor attempted to pay every creditor including Mr. Stanly more than a year ago which
2 motion was opposed by Mr. Stanly. The Court was inundated with the bills and debts of
3 Mr. Lopez at the previous Motion for Summary Judgment re the total number of creditors.
4 The Court knows that there are very few creditors of this estate who are owed small
5 amounts beyond Mr. Stanly.

6 Mr. Lopez prays that this court deny the motion to strike the Answer and set a trial
7 date. Mr. Keehn, the attorney for the single petitioning creditor, has advised the court on
8 more than one occasion that once the deposition of Mr. Lopez was complete, he would file
9 a Motion for Summary Judgment as to Phase II. Mr. Lopez traveled to San Diego at his
10 own cost without a court order requiring him to do so and appeared for his deposition on
11 October 23, 2007. He answered the questions of Mr. Keehn for more than six hours. The
12 long trail of this case is ready to finish. The Court should not allow it to be short-circuited
13 by striking the Answer.

14 As to the Sanctions, Mr. Lopez, through counsel, offered on December 17, 2007 to
15 pay \$4,000 of the sanctions immediately and \$1,000 per month for four months thereafter.
16 See **Exhibit "A."** Mr. Keehn responded on December 20, 2007 with a resounding "no."
17 That email communication is not attached because it contained other settlement discussion.

18 Terminating sanctions is an extreme remedy which should not be assessed except in
19 extraordinary circumstances. Here Mr. Lopez has provided every document in his
20 possession, responded to written discovery more than once, and attended his deposition
21 twice. Nothing has been withheld; the most that has happened is that Mr. Lopez has
22 perhaps been dilatory with some of his responses and in making preparations to attend his
23 second deposition in San Diego. There was one Motion to Compel which was complied
24 with. The Second Motion to Compel resulted in an Order of this court prohibiting Mr.
25 Lopez from introducing any document as evidence that had not already been produced.
26 There was no finding of the court that Mr. Lopez had in any way violated the Order from
27 the first Motion to Compel. Counsel for Lopez agreed to the prohibitory order after
28 explaining to the court that there were simply no further documents that were relevant that

1 could be produced. There is no discovery order that Mr. Lopez has failed to comply with.
2 There was no order to appear for his deposition. Mr. Lopez voluntarily traveled to San
3 Diego for the convenience of Mr. Keehn without a court order.

4 In *Wyle v. R.J Reynolds Industries, Inc.* 709 F.2d 585 (9th Cir. 1983), the court said,
5 “courts have inherent power to dismiss an action when a party has willfully deceived the
6 court and engaged in conduct utterly inconsistent with the orderly administration of
7 justice.” There is no deceit on behalf of Mr. Lopez. The *Wylie* court said, “[B]ecause
8 dismissal is so harsh a penalty, it should be imposed only in extreme circumstances” citing
9 *Raiford v. Pounds*, 640 F.2d 944,945 (9th Cir. 1981). “Sanctions interfering with a
10 litigant's claim or defenses violate due process when imposed merely for punishment of an
11 infraction that did not threaten to interfere with the rightful decision of the case.” Citing
12 *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978).

13 Mr. Keehn has received every document he has requested. He has taken two
14 depositions over two full day periods. He has told the court he will file a Motion for
15 Summary Judgment once the deposition is complete. The deposition is complete. Mr.
16 Keehn has not suggested that Mr. Lopez refused to respond to any question asked or that
17 the delay in flying to California of about five weeks resulted in any prejudice or harm to
18 his ability to go through with his Motion for Summary Judgment.

19 The *Wylie* court “determined that the deliberate deception and the irreparable loss of
20 material evidence justified the sanction of dismissal.” There has been no deliberate
21 deception and no loss of anything.

22 In *Matter of Visioneering Const.*, 661 F.2d 119, 123 (9th Cir. 1981), an involuntary
23 petition case, the court struck the Answer. The court said,” [The alleged debtor's] near
24 total refusal to facilitate discovery related to the jurisdictional factual issues and continued
25 failure to respect discovery orders were therefore justifiably sanctioned by the entry of
26 default.” There has been no “near total refusal.” Mr. Lopez has provided hundreds of
27 pages of documents to Mr. Keehn.
28

1 Wherefore Alleged Debtor Francis Lopez prays that the court deny this motion,
2 allow him to pay the sanctions in payments of \$4,000 immediately and \$1,000 per month
3 and set a date to hear the Motion for Summary Judgment that Stanly has long promised to
4 file.

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6
7 Dated: January 14, 2008

Respectfully submitted

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10 By: 

11 M. Jonathan Hayes
12 Attorney for Alleged Debtor Francis
13 Lopez
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DECLARATION OF FRANCIS LOPEZ

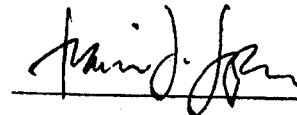
I, Francis Lopez, declare and state as follows:

1. I am the alleged debtor in this involuntary proceeding. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently thereto.

2. I did not make the sanctions payment because I was unable to come up with the full amount of the sanctions in Mid-December. I authorized my attorney to offer to pay \$4,000 immediately and \$1,000 per month until paid.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on this 14th day of January, 2008 at Destin, Florida.

By: _____



Francis Lopez

M. Jonathan Hayes

From: "M. Jonathan Hayes" <jhayes@polarisnet.net>
To: "L. Scott Keehn" <scottk@keehnlaw.com>
Sent: Wednesday, December 19, 2007 11:05 AM
Subject: Francis Lopez Sanctions

Mr. Keehn,

My client does not have the \$8,100 in sanction to pay now. He can pay you \$4,000 now and \$1,000 per month until paid. Let me know if that will work.

Thanks, Jon Hayes

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If you have received this message in error, please call (818) 710-3656 and notify me of that fact and destroy all copies of this message."

Thank you.

PROOF OF SERVICE

I, MJ Hayes, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 21800 Oxnard St., Suite 840, Woodland Hills, CA 91367. On January 15, 2008, I served the within documents:

OPPOSITION OF ALLEGED DEBTOR TO MOTION FOR TERMINATING SANCTIONS; DECLARATION OF FRANCIS J. LOPEZ IN SUPPORT THEREOF

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

.. by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

.. by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery

.. by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

L. Scott Keehn
KEEHN & Assoc, APC
402 W. Broadway, Suite 1210
San Diego, CA 92101
AND BY EMAIL

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 15, 2008, at Los Angeles, California.


MJ Hayes